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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 22 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a garment manufacturer and sewing contractor. It seeks to employ the beneficiary permanently in the United States as a sewing room manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that the director failed to adequately review the petitioner's financial information.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 15, 2001. The beneficiary's salary as stated on the labor certification is $22.82 per hour or $47,465.60 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 2000 and has 47 employees. The record reflects that it is organized as a corporation. Nothing in the record suggests that it currently employs the beneficiary.

As evidence of its ability to pay, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. This tax return indicates that the petitioner declared $31,607 as ordinary income. Schedule L of the coporate tax return shows current assets and current liabilities. Current assets were $24,643 and current liabilities were $6,085. The difference of $18,558, between current assets and current liabilities, is the value of the petitioner's net current assets at the end of the year. CIS will consider net current assets in addition to net income because it reflects the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet. Here, neither the petitioner's ordinary income of

$31,607, nor its net current assets of $18,558, was sufficient to cover the beneficiary's proposed wage offer of $47,465.60.

On November 26, 2002, the director issued a notice of intent to deny the petition. The director found that the information revealed on the petitioner's federal tax return failed to support its continuing ability to pay the proffered wage. The director afforded the petitioner thirty days to submit additional evidence or arguments to support the petition.

The petitioner, through counsel, responded to the notice of intent to deny on December 23, 2002. Counsel asserted that the depreciation deduction of $16,774 should be added back to the petitioner's net income as a non-cash deduction. Counsel also maintains that $1,735 should also be added back to the petitioner's declared ordinary income as the amount remaining after deducting living expenses from the $24,000 showing on the tax return as officer's compensation. Counsel asserts that the cases cited by the director do not mandate the standard that CIS must follow.

The director subsequently denied the petition on November 26, 2002, citing the same reasons as set forth in its notice of intent to deny.

On appeal, counsel reasserts that the depreciation expense taken by the petitioner should be added back to the petitioner's net income because it represents the accelerated recovery of capital expenses rather than straight-line depreciation. Counsel attaches an Internal Revenue Service (IRS) pamphlet as guidance. This appears to be a distinction without a difference and counsel cites no authority that such a distinction should be made. In determining the petitioner's ability to pay the proffered wage, CIS may rely on the net income figure reflected on the petitioner's federal income tax return. *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532, 537 (N.D. Tex. 1989)(citing cases). The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original Emphasis.) *Chi-Feng Chang* at 537.

Similarly, the compensation paid to officers has already been factored into the petitioner's net income as shown on the federal tax return. Amounts already expended do not represent assets out of which the proffered wage can be paid.

Counsel finally claims that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) may be applicable where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established.

He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa.* Rather, the record shows that the petitioner was established two years before filing the immigrant visa petition and has had one modestly profitable year, yet not profitable enough to prove its ability to pay the proffered wage.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO cannot conclude that the petitioner has persuasively demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.